SEK KIM WAH

v.

PUBLIC PROSECUTOR

COURT OF APPEAL, SINGAPORE
WEE CHONG JIN CJ
AP RAJAH J
CHAN SEK KEONG JC
[CRIMINAL APPEAL NO. 11/85]
10 JULY 1987

CRIMINAL PROCEDURE: *Section 300 Penal Code-Murder - Defence of diminished responsibility - Exception 7 of s. 300 - Proof of abnormality of mind - Whether question of law or fact.*

EVIDENCE: *Expert evidence - Motive of the killings - Whether evidence is conclusive.*

This is an appeal by appellant against conviction of murder. The facts are, the appellant and one Nyu Kok Meng planned to rob the house of Robert Tay, the appellant's former employer. On the morning of 23 July 1983 they went to the house, the appellant armed with a rifle and Nyu armed with a knife. When they entered the house, there were five people present. Robert Tay, his wife, their 10 year old daughter, her tutor and the maid. They were forced into a room and their hands were tied. Appellant ransacked the room while Nyu kept watch over the victims. Appellant demanded a cheque from the wife and was given for $5,000. Appellant went to cash the cheque and returned after half an hour. He then went out again, this time with Robert Tay for the purpose of withdrawing money from his Post Office Savings Bank Account. They returned to the house at 12.45 p.m. The appellant gagged the victims and took the wife into the master bedroom and strangled her. Half an hour later he led Robert Tay to the study room and strangled him, then he hit his head with a wooden stool. Later the appellant took the maid into the master bedroom and also strangled her. Nyu went to the master bedroom and the study room and saw what happened. Nyu stopped the appellant from further killing the daughter and her tutor. Appellant left the house in Robert Tay's car. Nyu released the two surviving victims and left on the appellants motorcycle. Appellant was arrested six days later.

During the trial, the appellant raised the defence of diminished responsibility under exception 7 of s. 300. Defence called two expert witnesses to give evidence that the appellant was suffering from abnormality of the mind when he committed the offence. Prosecution called one expert witness to rebut the defence's case. At the end of the case, the trial Judges were satisfied that the appellant was not suffering from any abnormality of the mind so as to enable him to come within the ambit of exception 7 of s. 300. Appellant was found guilty and was convicted. Appellant appealed.

Held:

[1] The learned Judges agreed that the issue of abnormality of the mind is a question of fact, for the jury, to be considered in the light of all available evidence including medical evidence. The trial Judges, in assuming the role of the jury in deliberating on this issue would be entitled to reject or differ from the opinions of the medical men, if there are other facts on which they could do so.

[2] There were overwhelming evidence to show that the appellant's motive for the killings was to eliminate witnesses and thus preventing himself from being identified. It was not a form of self aggrandisement as was suggested by the defence's expert witnesses.

[Appeal is therefore dismissed.]

Cases referred to:
R. v. Byrne [1960] 44 Cri App Rep 246
Walton v. R. [1978] 66 Cri App Rep 25
R. v. Steffan Ivan Kistako [1979] 68 Cri App Rep 62

Legislation referred to:
Penal Code [Sing], s. 300

JUDGMENT

Wee Chong Jin CJ, AP Rajah J, Chan Sek Keong JC:

The appellant was found guilty by the High Court on three charges of murder and convicted accordingly. He appealed against his conviction.

The appellant had accepted the prosecution's evidence that he had killed the three deceased persons named in the charges against him. The appellant had however claimed trial to all three charges, relying solely on the defence of diminished responsibility under Exception 7 of s. 300 of the Penal Code.

The unchallenged facts relating to the killings are as follows:

On 22 July 1983 the appellant got together some friends including one Nyu Kok Meng and took them to the vicinity of a petrol kiosk at Serangoon Garden Estate, planning to rob the kiosk. The robbery did not take place as the appellant's friends thought the police were following them.

The appellant then decided to go to Marine Parade to commit robbery. Only Nyu accompanied him. On the way the appellant changed his mind and took Nyu to Andrew Road where he pointed out the house of his former employer, Robert Tay, whom he said they would rob the next morning. This house was at No. 4 Andrew Road.

The next morning, on 23 July 1983, the appellant and Nyu went to Andrew Road and kept observation on No. 4, Andrew Road whilst pretending to repair the appellant's motorcycle. Nyu was armed with a knife while the appellant was armed with a rifle.

When the opportunity came, both the appellant and Nyu rushed into the house. Five persons were then present in the house: Robert Tay, his wife Annie Tay, their maid Jovita Virador, their 10-year old daughter Dawn Tay, and their daughter's tutor Madam Tang. All five were forced into one of the rooms. The appellant then tied their hands behind their backs with raffia strings.

The appellant then began ransacking the house while Nyu stood guard over the victims. After he was through, the appellant was still dissatisfied with what he had found. He demanded a cheque from Annie Tay. Annie Tay wrote a cheque for $5,000. The appellant took the cheque and left the house to cash it, leaving Nyu to keep watch over the victims.

The appellant cashed the cheque and returned half an hour later. He then left the house a second time, this time with Robert Tay. The appellant brought Robert Tay to withdraw a total of $7,000 from the latter's Post Office Savings Bank account. They returned to No. 4

Andrew Road at about 12.45 pm. After Robert Tay entered the room, the appellant again tied his hands behind his back.

The appellant next gagged all 5 victims. He then led Annie Tay to the master room where he strangled her with raffia string. Annie Tay died from asphyxia due to strangulation.

Half an hour later the appellant returned to the room where the rest of the victims were held and this time led Robert Tay to the study room. The appellant first strangled Robert Tay with raffia string and then hit him on the head with a wooden stool. Robert Tay died from a fractured skull.

Twenty minutes later, the appellant returned and grabbed hold of the maid, Jovita. He led the maid to the master bedroom and strangled her with raffia string. Like Annie Tay, Jovita too died from asphyxia due to strangulation.

Sometime after this, Nyu left the bedroom where Mdm Tang and Dawn Tay were being held and went to the master bedroom where he saw the bodies of Annie Tay and Jovita. The appellant was then still in the master bedroom.

Nyu then walked to the study room where he saw Robert Tay lying face down on the floor with blood near his head.

At this time Nyu noticed the appellant walking towards the bedroom where Mdm Tang and Dawn Tay were; he ran past the appellant, entered the bedroom and closed the door. The appellant wanted to kill Mdm Tang and Dawn Tay as well but was prevented from entering the bedroom by Nyu.

The appellant then left the house driving Robert Tay's Mercedes Benz after Nyu told him to escape as he had reported the matter to the police. Nyu then released Mdm Tang and Dawn Tay both of whom went next door to No. 5 Andrew Road and called the police. In the meantime, Nyu escaped on the appellant's motorcycle. While riding the motorcycle along the main road, Nyu met the appellant driving the Mercedes Benz.

Both the appellant and Nyu then returned to the appellant's room at Bukit Timah. The appellant asked Nyu to fix false number plates on the Mercedes Benz. The appellant also gave Nyu a gold chain and a jade pendant plus $2,000 in cash. The appellant next drove Nyu to the latter's place of work to collect Nyu's passport after which the appellant went to collect his own passport.

The next day, on 24 July 1983, Nyu left Singapore for Malaysia. On 2 August 1983, he surrendered to the Malaysian Police and was extradited to Singapore. On 8 July 1985, Nyu pleaded guilty in the High Court for an offence under s. 33 of the Arms Offences Act, 1973 and was sentenced to life imprisonment and 6 strokes of the cane.

On 29 July 1983, approximately six days after the gruesome killings, the appellant was arrested.

The defence contended that the appellant was suffering from abnormality of mind during the killings, within the meaning of Exception 7 to s. 300, Penal Code. **Exception** 7 provides that:

> Culpable homicide is not murder if the offender was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in causing the death or being a party to causing the death.

In support of this contention, the defence called two psychiatrists to give expert evidence as to the appellant's alleged abnormality of mind.

Dr John Ellard gave evidence and stated his opinion that the appellant satisfied the criteria for Antisocial Personality Disorder, as classified in the Diagnostic and Statistical Manual of Mental Disorders (3rd Edn.) which is usually referred to as DSM III. This opinion was based on an interview with the appellant on 4 August 1985 in Changi Prison, and on police statements which he had read.

According to Dr Ellard, Anti-Social Personality Disorder was a mental abnormality of mind and the appellant's abnormality of mind arose from his retarded development brought about the absence of those factors necessary for normal development such as a stable family structure through childhood and adolescence and caring parents who provided not only affection, guidance and the physical necessities of life, but who were themselves satisfactory models for the developing child to follow.

Dr Wong Yip Chong, the assigned defence psychiatrist expressed his opinion that the appellant suffered from a Psychopathic Personality Disorder arising from inherent as well as environmental causes. Dr Wong clarified that in his mind, Anti-social Personality Disorder and Psychopathic Personality Disorder were one and the same thing and were abnormalities of the mind.

In rebuttal, Dr Chew Seck Kee, Senior Psychiatrist, Woodbridge Hospital gave evidence for the prosecution. Dr Chew was of the opinion that the appellant was not of abnormal mind at the time of the alleged offences there was no evidence to show that the appellant suffered from any mental illness or psychopathic personality disorder. Dr Chew also gave evidence that the appellant had told him that his main intention was to rob but he had to kill as he was recognised and would be caught.

At the end of the case, after taking into consideration all the evidence adduced, the trial Judges came to the conclusion, on a balance of probabilities, that at the time the accused killed Robert Tay, Annie Tay and Jovita, he was not suffering from any abnormality of the mind to enable him to come within the ambit of Exception 7 to s. 300 of the Penal Code.

Before us Counsel for the appellant had argued with great perseverance that the trial Judges had erred in coming to this conclusion, and that the appellant had in fact suffered from abnormality of the mind when he carried out the killings. Counsel relied extensively on the opinion given by Dr Ellard and Dr Wong, and sought to persuade us that the learned trial Judges were wrong in rejecting the evidence of Dr Ellard and Dr Wong and in preferring the evidence of Dr Chew.

Having heard the arguments of Counsel for the appellant, and having considered the evidence recorded in the verbatim notes as well as the grounds of decision of the trial Judges, we were satisfied that the appeal could not possibly succeed, both on the law and on the facts. Accordingly, we dismissed the appeal. We now give our reasons.

The relevant principles of law governing the finding as to abnormality of mind, in cases where diminished responsibility is pleaded, are well settled.

In *R v. Byrne* [1960] 44 Criminal Appeal Rep. 246, the Court of Criminal Appeal held, at pp. 252 to 253, that

> 'Abnormality of mind', which has to be contrasted with the time-honoured expression in the M' Naughten Rules 'defect of reason', means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to

> be wide enough to cover the mind's activities in all its aspects, not only the perception of physical acts and matters, and the ability to form a rational Judgment whether an act is right or wrong, but also the ability to exercise will power to control physical acts in accordance with that rational Judgment. The expression 'mental responsibility for his acts' points to a consideration of the extent of which the accused's mind is answerable for his physical acts, which must include a consideration of the extent of his ability to exercise will power to control his physical acts.
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> **Whether the accused was at the time of the killing suffering from any 'abnormality of mind' in the broad sense which we have indicated above is a question for the jury. On this question medical evidence is, no doubt, of importance, but the jury are entitled to take into consideration all the evidence including the acts or statements of the accused and his demeanour. They are not bound to accept the medical evidence, if there is other material before them which, in their good Judgment, conflicts with it and outweighs it.** The etiology of the abnormality of mind (namely, whether it arose from a condition of arrested or retarded development of mind or any inherent causes or was induced by disease or injury) does, however, seem to be a matter to be determined on expert evidence.
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> [Emphasis added]

Subsequently, in *Walton v. R* [1978] 66 Cri App Rep 25 the Privy Council, after considering the cases, said, at p. 30,

> These cases make clear that **upon an issue of diminished responsibility the jury are entitled and indeed bound to consider not only the medical evidence but the evidence upon the whole facts and circumstances of the case.** These include the nature of the killing, the conduct of the accused before, at the time of and after it and any history of mental abnormality. **It being recognised that the jury on occasion may properly refuse to accept medical evidence, it follows that they must be entitled to consider the quality and weight of that evidence.** As was pointed out by Lord Parker CJ in *Byrne* [1960] 44 Cr App R 246; [1960] 2 QB 396 what the jury are essentially seeking to ascertain is whether at the time of the killing the accused was suffering from a state of mind bordering on but not amounting to insanity. That task is to be approached in a broad common sense way.
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> [Emphasis added]

In our context the trial Judges would assume the role of the jury in making this finding and it is equally clear that the same principles enumerated in the case set out above, apply. Thus, the verdict as to abnormality of mind is plainly a finding of fact which must be founded on all the evidence which evidence of course includes medical opinion. Even where such medical opinion is unchallenged, the trial Judges would be perfectly entitled to reject or differ from the opinions of the medical men, if there are other facts on which they could do so. In such as case, an appellate Court would not, and indeed could not, disturb their finding (see, for example, *R v. Steffan Ivan Kistako* [1979] 68 Cri App R62). *A fortiori*, if such medical opinion is challenged and there is conflicting medical opinion in addition to other non-medical evidence.

In the present case, there is, in our judgment, overwhelming evidence on which the trial Judges were entitled to make the finding which they did. Not only would it be wrong for us to disturb that finding, we do not in any event disagree with the trial Judges' finding that there was no abnormality of mind.

The trial Judges had found Dr Ellard's evidence unconvincing in all the circumstances of the case. Dr Ellard's opinion was based primarily on his one and only interview with the appellant on 4 August 1985 in Changi Prison and partly on police statements which he had

read. The trial Judges found that on the evidence adduced in Court, not all of the facts relied on by Dr Ellard were correct.

It would be pertinent at this point to add that the facts on which an expert's opinion is based must be proved by admissible evidence, just like any other fact relevant to the case. The expert's role is to explain to the Judge the application of the necessary scientific or medical criteria so as to enable the Judge to come to his own Judgment by the application of these criteria to the facts proved in evidence.

In this case, Dr Ellard had agreed with the trial Judges that if the appellant had killed in order to eliminate witnesses, then in his opinion, that would not be a psychiatric disorder. However, Dr Ellard felt that in this case the appellant had killed primarily to enhance his self-esteem. The trial Judges, on the other hand, found on the evidence that the appellant had killed with the sole purpose of eliminating witnesses.

It must be emphasised that the appellant's motive for killing the three deceased is a fact the finding of which is solely within the province of the trial Judges. In this respect, we would also note that there was ample evidence to show that the appellant had indeed killed to eliminate identification.

The appellant's brother-in-law, Lau Puay Cheow, gave evidence that when he asked the appellant why he had killed the three deceased, the appellant had replied that he did so because he was afraid of being identified.

Dr Chew also gave evidence that during his examination of the appellant, the appellant had said that his main intention had been to rob but that he had to kill as he was recognised and would be caught; the appellant had said that it was his life or theirs.

In addition there was evidence from Inspector Sathasivam who had earlier recorded a statement from the appellant, that the appellant had told him he killed the three deceased because he was afraid they would subsequently identify him.

Even the appellant himself had in his examination-in-chief said that originally he did not intend to kill but then he was recognised by Robert Tay. The appellant then went on to clarify that as he had been an inmate in the Boys' Home he could be traced and Robert Tay would identify him.

Dr Ellard's view that the appellant had killed primarily to enhance his self-esteem, was, according to him, evidenced by the fact that the accused boasted about the killings. However, the trial Judges had found on the evidence that the appellant might be said to have spoken boastfully about the killings to only one person - Lily Tay, a lounge hostess whom the appellant had befriended.

There was also some reliance on the fact that the appellant had also told Lily Tay that he had been responsible for the killing of a couple whom he had robbed at Marine Parade less than a month before the present murders. This, Dr Ellard felt, supported his view that the appellant had killed mainly as a form of self-aggrandisement. However, the evidence showed that when the appellant killed the couple at Marine Parade, there was nothing to indicate any self-aggrandisement. Indeed, the appellant had thought long and hard before he killed the couple. Further, the appellant had not mentioned anything about the Marine Parade killings until after the couple's bodies were discovered at Seletar. Until these bodies were found, the appellant had been quite content to keep silent about the Marine Parade murders.

Dr Wong's evidence was rejected by the trial Judges who found his evidence was not impartial. In addition, the trial Judges disagreed with Dr Wong's interpretation of much of the evidence which he selected to support his arguments.

Dr Wong had given his opinion that the appellant was suffering from abnormality of mind caused by a physiological sluggish central nervous system which caused him to develop a psychopathic personality by reason of his bad home environment and unfavourable social surroundings. However, Dr Wong also admitted that this sluggish central nervous system concept was still in the theoretical stage and that the appellant had not been subjected to any tests in this respect because no such tests were available.

The trial Judges also felt that Dr Wong has made no attempt to trace a pattern of conduct to show that the appellant was probably of abnormal mind when he committed the killings. The trial Judges also found a significant absence of positive factors relating to the appellant's personality and background, in Dr Wong's report. Dr Wong's explanation for this was that he did not wish to clutter up his report by mentioning the positive factors as it would weaken the appellant's case!

In our opinion the trial Judges were clearly entitled on the evidence to reject Dr Wong's opinion which they had found to be of not much help.

Dr Chew, the prosecution's expert witness, was of the view that there was no evidence to show that the appellant was of abnormal mind at the trial of the alleged offences. Dr Chew took into account the appellant's history and background and gave his opinion that the appellant had shown prudence and foresight in his actions. Also, there was no sign that the appellant had killed to enhance his self-esteem and, as far as he knew, the appellant had killed to eliminate witnesses.

The trial Judges accepted Dr Chew's evidence, and in our Judgment, correctly so, as Dr Chew's opinion was based on facts consistent with the facts found by the trial Judges themselves.

There remains for us to comment on two other points. The appellant had recounted his alleged experience of being strangled and hit on the head when he was in the Boys' Home. He also said that he was re-living this experience as he was strangling Annie Tay. We would note that the trial Judges had rejected this alleged experience as a figment of the appellant's own imagination. The medical evidence as well as the report from the Boys' Home showed that the appellant had injured himself when he fell whilst playing with some other inmates. There was no injury on the back of his head or on his neck.

We would also note that the appellant never raised this incident, and indeed the appellant was uncooperative with even Dr Wong until after Dr Wong apprised him of the possibility of a defence of diminished responsibility. This we feel places grave doubt on the defence raised.

For all the above reasons, we dismissed the appellant's appeal.

Also found at [1988] 1 CLJ 739